

THE RULE OF LAW IN AFGHANISTAN: PROSPECTS UNDER THE TALIBAN RULE

Amal Sethi*

This chapter examines Afghanistan's legal and governance structures following the Taliban's 2021 return to power, analyzing how their interpretation and implementation of Sharia law fundamentally challenges conventional rule-of-law principles. Through an analysis of the Taliban's governance model, the chapter demonstrates how their selective and extreme interpretation of Islamic law serves primarily as a mechanism for social control and power consolidation rather than legitimate legal administration. It examines three critical aspects: the intentional ambiguity in their legal framework, their departure from traditional Islamic jurisprudential principles, and the systematic dismantling of institutional independence. While the Taliban's justice system provides swift resolution in civil matters, it undermines fundamental legal protections through arbitrary enforcement and harsh punishments. The chapter reveals how their interpretation of Sharia deviates significantly from both historical Islamic legal traditions and contemporary Islamic jurisprudence. By analyzing the Taliban's approach to governance and law, the chapter offers insights into the challenges of establishing the rule of law in post-conflict societies and questions the viability of externally imposed legal frameworks in culturally distinct contexts.

1. Introduction

In August 2021, the Taliban swept into the capital city of Kabul and toppled the Western-backed Government of Ashraf Ghani.¹ To those uninformed of developments in Afghanistan, these events would have come as an enormous surprise. Nevertheless, they were years in the making. The only question was how the realignment of power in Afghanistan would occur. Several commentators were optimistic that it would happen more organically and peacefully.²

*Lecturer in Public Law, University of Leicester.

¹A. Seir, R. Faiez, T. Akhgar and J. Gambrell, 'Taliban sweep into Afghan capital after government collapses', *AP News*, 16 August 2021 <<https://apnews.com/article/afghanistan-taliban-kabul-bagram-e1ed33fe0c665ee67ba132c51b8e32a5>>.

²A. Sethi, 'Afghanistan' in R. Albert, D. Landau, P. Faraguna and S. Drugda (eds), *The I-CONnect-Clough Center 2020 Global Review of Constitutional Law 2020*, I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, Boston 2020, p. 12.

To understand the present, there is a need to examine the past. The Taliban is a fundamentalist Islamist group formed by the Afghan mujahideen in the early 1990s.³ After decades of different wars, the Taliban established a hard-line government in Afghanistan in 1996.⁴ Despite its harsh practices, the Taliban Government had adequate local support in its initial years.⁵ This was because Afghans saw some semblance of stability at last.⁶ However, in 2001, the Taliban Government was overthrown post the American invasion of Afghanistan.⁷ To fill the power vacuum in Afghanistan, the United States and other Western forces quickly helped establish a new government headed by an ally of the West, Hamid Karzai.⁸ Despite widespread optimism, this did not bring an end to the problems in Afghanistan.

The new government that was established with the help of the West was arguably always bound to fail.⁹ While the precise reasons for this are beyond the scope of this report, it is essential to note that the system established with the help of Western powers was a highly centralised one in a country where the central government barely had control of 30% of the entire territory.¹⁰ Afghanistan was (and is) a country with deep ethnic cleavages and is run primarily by warlords who rely on the illegal opium trade for their finances.¹¹ These war-

³L. Maizland, 'The Taliban in Afghanistan', *Council on Foreign Relations*, 15 September 2021 <<https://www.cfr.org/backgrounder/taliban-afghanistan#chapter-title-0-5>>.

⁴*ibid.*

⁵*ibid.*

⁶*ibid.*

⁷E. Nagourney, 'Who Are the Taliban, and What Do They Want?', *New York Times*, 7 October 2021 <<https://www.nytimes.com/article/who-are-the-taliban.html>>.

⁸Afghanistan Legal Education Project, *An Introduction to the Constitutional Law of Afghanistan*, 2nd edn, Stanford Law School, Stanford 2015, p. 27.

⁹A. Sethi, 'Book review: Afghanistan Legal Education Project, An Introduction to the Constitutional Law of Afghanistan (Stanford Law School, Rule of Law Program, 2nd Edition, 2015)' (2021) 5(2) *Indian Law Review* 250, 251–59.

¹⁰A. Chughtai, 'Infographic: Who Controls What in Afghanistan', *Al Jazeera*, 11 August 2021 <<https://www.aljazeera.com/news/2021/8/11/afghanistan-who-controls-what>>.

¹¹A. Sethi, 'Afghanistan' in R. Albert, D. Landau, P. Faraguna and S. Drugda (eds), *The I-CONnect-Clough Center 2020 Global Review of Constitutional Law 2020*, I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, Boston 2020, p. 9.

lords never had an incentive to cooperate with the central government, and there was little effort from the central government to change the status quo.¹² Further, the West's plan to establish the rule of law in Afghanistan was highly technocratic, with much Western effort and support focused only at the central level.¹³ It did not help that the West's partners on the ground were highly corrupt, had authoritarian ambitions of their own, and did not look beyond their short-term agendas.¹⁴ The net result was that, despite the promise of the 2004 Constitution's preamble to operate a society based on the rule of law beyond the main urban hubs, Afghanistan was a country without any order or the rule of law.¹⁵ Though the Western-backed government made significant inroads in urban areas to establish the rule of law, the vacuum in the countryside allowed the Taliban to re-emerge.¹⁶

Within a few years of its ouster, the Taliban was able to regain control in Afghanistan. The same reasons that allowed the Taliban to come into power in 1996 were responsible for its resurgence – a point discussed in more detail later in this report. Initially, the Taliban had agreed to enter into peace negotiations to help restore Afghanistan.¹⁷ Once the American forces started to withdraw, the Taliban no longer felt the need to do so and decided to use force to topple the government in Kabul.¹⁸

¹²A. Sethi, 'Book review: Afghanistan Legal Education Project, An Introduction to the Constitutional Law of Afghanistan (Stanford Law School, Rule of Law Program, 2nd Edition, 2015)' (2021) 5(2) *Indian Law Review* 250, 256.

¹³G. Swenson, 'Why U.S. efforts to promote the rule of law in Afghanistan failed' (2017) 42(1) *International Security* 114, 114–51.

¹⁴*ibid.*

¹⁵A. Bacsko, 'How the Taliban Justice System Contributed to their Victory in Afghanistan', *Insights From Social Science*, 26 October 2021 <<https://items.ssrc.org/insights/how-the-taliban-justice-system-contributed-to-their-victory-in-afghanistan/>>.

¹⁶*ibid.*

¹⁷A. Sethi, 'Afghanistan', in R. Albert, D. Landau, P. Faraguna and S. Drugda (eds), *The I-CONnect-Clough Center 2020 Global Review of Constitutional Law 2020*, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, Boston 2020, pp. 10–11.

¹⁸S. Karimi, 'Afghanistan shows the U.S. folly of trying to implant democratic institutions abroad', *The Conversation*, 29 September 2021 <<https://theconversation.com/afghanistan-shows-the-u-s-folly-of-trying-to-implant-democratic-institutions-abroad-167613>>.

Much can be said about the failure of the previous Afghanistan government to establish the rule of law. Nonetheless, this report will primarily focus on the issue of the rule of law under the current Taliban regime. Since the Taliban has resumed control of Afghanistan, there have been questions concerning how it will run the country. The world has changed considerably since the Taliban was last in power, and their old ways (which were unacceptable then) would certainly raise serious concerns today. Some think that the Taliban might operate with moderation this time around,¹⁹ while others are sceptical.²⁰ This report will demonstrate how the latter fears are justified. It will show how the Taliban's governance structure, legal system, and general manner of operation are not conducive to the sustenance of the rule of law. In doing so, the report will also seek to provide some words of caution on international efforts to establish the rule of law in societies such as Afghanistan.

The rest of the report proceeds as follows. Section 2 provides an overview of the governance and legal system under the Taliban. Section 3 discusses Sharia and the Taliban's version of Sharia – the system it hopes to implement in Afghanistan. Section 4 critically analyses the question of the rule of law under the Taliban and future prospects for the rule of law in Afghanistan. Finally, Section 5 concludes the discussion.

2. The Governance and Legal System Under the Taliban

Before discussing the issue of the rule of law in Afghanistan, it is essential to delve into the governance and legal system under Taliban rule. Though there can be no certainty on this question, the Taliban has made numerous statements and undertaken several decisions that could help answer this question in broad strokes. Moreover, the Taliban's previous rule from 1996–2001 could provide insight into the

¹⁹A. Ibrahim, 'Explainer: The Taliban and Islamic law in Afghanistan', *Al Jazeera*, 23 August 2021 <<https://www.aljazeera.com/news/2021/8/23/hold-the-taliban-and-sharia-law-in-afghanistan>>.

²⁰H. Rahimi, 'The Taliban, the Afghan state, and the rule of law', *Al Jazeera*, 1 September 2021 <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>>.

governance and legal regime under the Taliban, even though the Taliban claims to want to do things differently this time around.²¹

In normal situations, the place to understand a polity's governance and legal structures is in its constitution. From 2004–21, Afghanistan operated under a constitution drafted with the support (and pressure) of the United Nations and the Western power bloc.²² This constitution was laden with extensive liberal values that recognised diversity and protected women and minorities.²³ Nonetheless, the Taliban has vehemently opposed this constitution ever since they regained relevancy.²⁴ The Taliban called the 2004 Constitution a Western import and the biggest obstacle to peace in Afghanistan.²⁵ Thus, when the Taliban overthrew the American-backed government in 2021, one of their first actions was to dismantle the structural provisions of the 2004 Constitution and the system created by it.

In coming to power, Waheedullah Hashimi, a senior Taliban leader, strongly emphasised that there would be no democratic system in Afghanistan because such a system has no base in Islam.²⁶ Instead, Hashimi and several other senior Taliban leaders emphasised that Afghanistan would be governed under Sharia.²⁷ The Taliban has its own interpretation of what a Sharia-based system entails, which will be covered in detail in the next section. However, the Taliban clearly holds that a democratic rule (whatever it is they understand by it) is incompatible with Sharia.

²¹K. Gannon, 'Taliban say they are not looking to rule Afghanistan alone', *AP News*, 30 January 2019 <<https://apnews.com/article/zalmay-khalilzad-taliban-ap-top-news-international-news-asia-pacific-0624283628154a48b09f31ff173e3ad9>>.

²²A. Sethi, 'Book review: Afghanistan Legal Education Project, An Introduction to the Constitutional Law of Afghanistan (Stanford Law School, Rule of Law Program, 2nd Edition, 2015)' (2021) 5(2) *Indian Law Review* 250, 251–59.

²³*ibid.*

²⁴*ibid.* at 251.

²⁵*ibid.*

²⁶L. Lonas, 'Taliban commander rules out democracy in Afghanistan: "It is Sharia law and that is it"', *The Hill*, 19 August 2021 <<https://thehill.com/policy/international/568551-taliban-commander-rules-out-democracy-in-afghanistan-it-is-sharia-law>>.

²⁷*ibid.*

The Taliban, notwithstanding, announced plans to form a commission to draft a new constitution.²⁸ One of their spokespeople mentioned that this commission would be formed by scientists, lawyers, experts, and religious leaders from the country.²⁹ In the interim, they stated that they would temporarily implement provisions from King Mohammad Zahir Shah's 1964 Constitution of Afghanistan that are 'not in conflict with Islamic Sharia' to govern the country.³⁰ Again, this is not a straightforward statement and is intentionally unforthcoming about the Taliban's plan for several reasons.

Making vague statements has been a part of the Taliban's current strategy to appear more moderate. The 1964 Constitution was a homegrown constitution that introduced democracy and several liberal values within an otherwise monarchical system.³¹ It accepted a separation between religion and the governing institutions of the

²⁸A. Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now', *VOA News*, 28 September 2021 <<https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>>.

²⁹'Taliban plans to form "Commission" in 2022 to draft new constitution', *ANI News*, 23 September 2021 <<https://www.aninews.in/news/world/asia/taliban-plans-to-form-commission-in-2022-to-draft-new-constitution20210923235409/>>.

³⁰*ibid*. Though it must be noted that some members of the Taliban Government have followed a different script regarding the system they are temporarily operating under. For example, when the foreign minister, Amir Khan Muttaqi, met with Andreas Von Brandt, the ambassador of the European Union to Afghanistan, he stated that they would respect the 2004 Constitution to the extent that it is not in contravention with Sharia. Another high-level judicial officer of the Taliban regime, Sayed Abu Bakr Muttaqi, mentioned that Afghanistan's 2004 Constitution was still in force but that its presidential and parliamentary provisions had been suspended. If anything, the 2004 Constitution was only more liberal and in line with present-day templates than even the 1964 Constitution. The reasons for stating that the 2004 Constitution is still operational are similar to Taliban members stating that they are operating under the 1964 Constitution – which is covered in depth in this section. For a detailed explanation of why some members of the Taliban are stating that they are operating under the 2004 Constitution as opposed to the 1964 Constitution, see A. Sethi, S. Chatterjee, A. Phalnikar, and A. Sheth, 'Afghanistan' in L.R. Barrosa and R. Albert (eds), *International Review of Constitutional Reform*, Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism, Austin (Texas) 2022, pp. 7–11.

³¹A. Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now', *VOA News*, 28 September 2021 <<https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>>.

state and established a government based on the people's sovereignty rather than religion.³² Even concerning the branches of government, it recognised the judiciary as a separate and coequal branch with the executive (the monarch) and the legislature (which had many elected members).³³ The Constitution required the supremacy of the statutory law over Sharia.³⁴ Courts were required to apply the provisions of the Constitution and statutory law, and Sharia was to be used only in cases of the absence of codified law on the subject.³⁵

The Constitution also contained liberal provisions relating to formal equality, freedom of speech and expression, protection of property rights, and the right to form political parties.³⁶

Many provisions of the 1964 Constitution are in complete opposition to how the Taliban operated in the past (and has even started operating already).³⁷ The Taliban has recently issued statements that might suggest they are embracing more liberal values.³⁸ Still, these statements are always laden with the caveat of the Taliban's only doing things that are not in conflict with Sharia without explaining what this entails.³⁹ In all of the Taliban's plans, 'not in conflict with Islamic Sharia' does a lot of heavy lifting. Since coming into power, the Taliban has been seeking as much legitimacy from foreign governments as possible and requesting the resumption of foreign aid to Afghanistan.⁴⁰ Issuing such vague statements, could possibly go a long way in achieving these goals.⁴¹

Given the contents of the 1964 Constitution, it is not certain which of its components the Taliban seeks to use. Curiously, this was the case with a draft of a constitution filled with contradictions that the

³²Afghanistan Legal Education Project, *An Introduction to the Constitutional Law of Afghanistan*, 2nd edn, Stanford Law School, Stanford 2015, p. 22.

³³*ibid.*

³⁴*ibid.*

³⁵*ibid.*

³⁶*ibid.*

³⁷See Section 3.

³⁸*ibid.*

³⁹*ibid.*

⁴⁰M. Fisher, 'How Will the Taliban Govern? A History of Rebel Rule Offers Clues', *New York Times*, 2 September 2021 <<https://www.nytimes.com/2021/09/02/world/asia/taliban-govern-rebel-history.html>>.

⁴¹*ibid.*

Taliban promulgated when they were in power in the 1990s.⁴² Beyond its giving the appearance of moderation, it is speculated that such a contradictory constitution might have been an attempt to prevent internal divisions over policy differences and to allow the Taliban to remain flexible in its policies.⁴³ Hence, perhaps it is wiser to examine the steps the Taliban has taken since coming into power to gain a more accurate idea of their plans for Afghanistan's governance and legal system.

As far back as January 2019, the Taliban had stated that 'they are not seeking a "monopoly on power" in a future administration in Afghanistan but are looking for ways to co-exist with Afghan institutions'.⁴⁴ They had, at that time, stated that if the Taliban returned, they would not operate in the same harsh manner as it had done in 1996.⁴⁵ A few days after regaining power in September 2021, the Taliban announced an interim government.⁴⁶ This interim government contained no women or officials from the previous regime, and it included very few members from ethnic minority communities in Afghanistan.⁴⁷ This interim government comprises men who are listed as terrorists by foreign governments and international organisations and have sanctions imposed on them.⁴⁸ Mohammad Hassan Akhund, who had held several senior roles within the Taliban while it was in exile, was announced as the acting prime minister.⁴⁹ The Taliban's co-founder, Mullah Abdul Ghani Baradar, another Taliban veteran, was installed as Akhund's deputy.⁵⁰ Sirajuddin Haqqani, the

⁴²F. Bezhan, 'Taliban Constitution Offers Glimpse Into Militant Group's Vision For Afghanistan', *RFERL*, 26 April 2020 <<https://www.rferl.org/a/taliban-constitution-offers-glimpse-into-militant-group-s-vision-for-afghanistan/30577298.html>>.

⁴³*ibid.*

⁴⁴K. Gannon, 'Taliban say they are not looking to rule Afghanistan alone', *AP News*, 30 January 2019 <<https://apnews.com/article/zalmay-khalilzad-taliban-ap-top-news-international-news-asia-pacific-0624283628154a48b09f31ff173e3ad9>>.

⁴⁵*ibid.*

⁴⁶L. Maizland, 'The Taliban in Afghanistan', *Council on Foreign Relations*, 15 September 2021 <<https://www.cfr.org/backgrounder/taliban-afghanistan#chapter-title-0-5>>.

⁴⁷*ibid.*

⁴⁸*ibid.*

⁴⁹*ibid.*

⁵⁰*ibid.*

head of the militant group Haqqani network, was named the acting interior minister.⁵¹ Mullah Mohammed Omar, the son of the Taliban's first leader, was appointed interim defence minister.⁵²

Yet, this is merely a shadow government. The actual power lies with the Taliban's leadership council, headed by an all-powerful religious cleric ('Amir'), Mawlawi Hibatullah Akhundzada.⁵³ It is worth noting that there are no formal rules in place to decide how such a leader is appointed nor for how long he holds power, but it is evident that he is the de facto head of state and has ultimate authority.⁵⁴ The council handles all the country's political, religious, social, and military affairs.⁵⁵ It oversees various commissions and administrative organs through which the Taliban operates a shadow government.⁵⁶ These commissions, in turn, focus on issues such as economics, education, health, military, and outreach.⁵⁷ The interim shadow government described above is ultimately responsible to the Taliban's leadership council.⁵⁸ This organisation is extremely similar to that which existed when the Taliban was in power in the 1990s.⁵⁹

Moreover, the Taliban has remained silent on whether they will hold any elections in the future.⁶⁰ The Taliban has dissolved the election commission in charge of supervising elections during the previous regime.⁶¹ Indeed, before the Taliban takeover, several electoral commission officials were killed by the Taliban.⁶² A Taliban spokesman mentioned that: 'There is no need for these commissions to exist

⁵¹ibid.

⁵²ibid.

⁵³ibid.

⁵⁴ibid.

⁵⁵ibid.

⁵⁶ibid.

⁵⁷ibid.

⁵⁸ibid.

⁵⁹F. Bezhan, 'Taliban Constitution Offers Glimpse Into Militant Group's Vision For Afghanistan', *RFERL*, 26 April 2020 <<https://www.rferl.org/a/taliban-constitution-offers-glimpse-into-militant-group-s-vision-for-afghanistan/30577298.html>>.

⁶⁰'Who Will Run the Taliban Government', *International Crisis Group*, 9 September 2021 <<https://www.crisisgroup.org/asia/south-asia/afghanistan/who-will-run-taliban-government>>.

⁶¹'"No Need": Taliban dissolves Afghanistan election commission', *Al Jazeera*, 25 December 2021 <<https://www.aljazeera.com/news/2021/12/25/taliban-dissolves-afghanistan-election-commission>>.

⁶²ibid.

and operate ... If we ever feel a need, the Islamic Emirate will revive these commissions'.⁶³ The Taliban has even dissolved other government departments, such as the Ministry for Peace and the Ministry for Parliamentary Affairs.⁶⁴ Based on these initial actions, it is unlikely that the Taliban will abide by its early statements and meaningfully share power. They appear to be continuing to operate (and intending to operate) a highly centralised government set up on lines similar to those prevalent in many autocracies.⁶⁵ Any decentralisation of power occurs within the framework of the Taliban leadership, which is a highly closed group.⁶⁶

Furthermore, the Taliban have expressed their intention to establish their own legal system. Since coming to power, they have slowly started opening (or reopening) courts in the country staffed with their own judges, including the Supreme Court in Kabul. However, beyond a repeated claim that their legal system would be designed in accordance with Sharia, very few details regarding this legal system have been provided. At this stage, they have declared that they would not put a harsh or illiberal legal system in place. On the contrary, they have frequently made assertions such as 'international laws and instruments which are not in conflict with the principles of Sharia' will be respected.⁶⁷ Little can be concluded from such isolated claims without a firm understanding of what the Taliban means when referring to Sharia.

Sharia, which simply signifies 'the way' in Arabic, is a corpus of codes and principles drawn from the Quran and from the sayings and way of life of the Prophet Muhammad.⁶⁸ Different branches of Islam

⁶³ibid.

⁶⁴ibid.

⁶⁵M. Fisher, 'How Will the Taliban Govern? A History of Rebel Rule Offers Clues', *New York Times*, 2 September 2021 <<https://www.nytimes.com/2021/09/02/world/asia/taliban-govern-rebel-history.html>>.

⁶⁶F. Bezhan, 'Taliban Constitution Offers Glimpse Into Militant Group's Vision For Afghanistan', *RFERL*, 26 April 2020 <<https://www.rferl.org/a/taliban-constitution-offers-glimpse-into-militant-group-s-vision-for-afghanistan/30577298.html>>.

⁶⁷A. Gul, 'Taliban Say They Will Use Parts of Monarchy Constitution to Run Afghanistan for Now', *VOA News*, 28 September 2021 <<https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>>.

⁶⁸See Section 3.

have markedly different interpretations of Sharia,⁶⁹ so much so that scholars have argued that particular versions of Sharia are more (if not less) in line with the rule of law principles and natural justice understood in the Western world.⁷⁰ Nevertheless, there is little evidence to suggest that the Taliban's version of Sharia attempts to reconcile principles of natural justice or the rule of law.⁷¹ If anything, it can be argued that the Taliban's idea of Sharia is more extreme than that which exists even in any corner of the Islamic world.⁷² The particular ideology behind the Taliban's version of Sharia and how it squares with the rule of law will be examined in the next section of this report.

Another point that needs to be mentioned before delving into substantive discussions regarding the rule of law in Afghanistan is the topic of Sharia courts under the Taliban. This is a rather important topic, and many argue that the Taliban's courts are one of the reasons they came into power.⁷³ To understand this, one needs to assess the era of the Western-backed regime in Afghanistan. The legal system that existed during the previous government was difficult to access, time-consuming, costly, and corrupt.⁷⁴ Against this background, and even while in exile, the Taliban slowly re-established itself in rural areas.⁷⁵ Over time, it set up courts in most of the country and provided a system for people to obtain rulings at the local level.⁷⁶ These courts were staffed by ulemas who received their training at Deobandi madrasas, often situated in Pakistan.⁷⁷ This facet of the court

⁶⁹ibid.

⁷⁰N. Feldman, 'Does Shariah mean the rule of law?', *New York Times*, 16 March 2008
<<https://www.nytimes.com/2008/03/16/news/16iht-16shariaht.11119704.html?>>.

⁷¹See Section 3.

⁷²ibid.

⁷³A. Baczko, 'How the Taliban Justice System Contributed to their Victory in Afghanistan' *Insights From Social Science*, 26 October 2021
<<https://items.ssrc.org/insights/how-the-taliban-justice-system-contributed-to-their-victory-in-afghanistan/>>.

⁷⁴A. Jackson and F. Weigand, 'Rebel Rule of Law: Taliban courts in the west and north-west of Afghanistan', Humanitarian Policy Group, London 2020, p. 2.

⁷⁵A. Baczko, 'How the Taliban Justice System Contributed to their Victory in Afghanistan', *Insights From Social Science*, 26 October 2021
<<https://items.ssrc.org/insights/how-the-taliban-justice-system-contributed-to-their-victory-in-afghanistan/>>.

⁷⁶ibid.

⁷⁷ibid.

system served a critical purpose. Though the Taliban appointed these judges, they were certified as qualified in Islamic law by madrasas independent of the Taliban.⁷⁸ This gave the judges of the Taliban's Sharia courts the social legitimacy needed to assure the populace that they were competent to decide disputes and impose sentences.⁷⁹ Like many other court systems the world over, the Sharia courts operated on a three-tier system in which appeals from local courts went to a provincial court, above which, at the apex, sat a Supreme Court (based in Quetta in Pakistan).⁸⁰

The Sharia courts had relatively simple procedures, resolved cases swiftly, and showed consistency in simple cases.⁸¹ The fact that court decisions were based on religious law and social norms gave them added legitimacy in conservative rural areas.⁸² Further, the issues of corruption that had plagued the formal judicial system were absent in the Taliban courts.⁸³ Since the Taliban had control over the territories where these courts were located, they could enforce the decisions of Sharia courts easily.⁸⁴ The relative success of these courts in administering justice helped build support for the Taliban in certain areas. Not only could they administer a state better than the Western-backed government, but they could also provide peace and security—something that, as will be seen, is very important to the people of Afghanistan.⁸⁵

3. Sharia and the Taliban's Version of Sharia

⁷⁸ibid.

⁷⁹ibid.

⁸⁰A. Jackson and F. Weigand, 'Rebel Rule of Law: Taliban courts in the west and north-west of Afghanistan', Humanitarian Policy Group, London 2020, p. 4.

⁸¹ibid. at pp. 4–5.

⁸²A. Baczko, 'How the Taliban Justice System Contributed to their Victory in Afghanistan', *Insights From Social Science*, 26 October 2021 <<https://items.ssrc.org/insights/how-the-taliban-justice-system-contributed-to-their-victory-in-afghanistan/>>.

⁸³A. Jackson and F. Weigand, 'Rebel Rule of Law: Taliban courts in the west and north-west of Afghanistan', Humanitarian Policy Group, London 2020, pp. 3, 7.

⁸⁴ibid. at p. 6.

⁸⁵A. Baczko, 'How the Taliban Justice System Contributed to their Victory in Afghanistan', *Insights From Social Science*, 26 October 2021 <<https://items.ssrc.org/insights/how-the-taliban-justice-system-contributed-to-their-victory-in-afghanistan/>>.

As stated earlier, the Taliban has tirelessly repeated that Afghanistan will be governed under Sharia. However, Sharia is not a list of laws. Sharia has its origin in the 7th century when the Prophet Muhammad established a Muslim community in Medina.⁸⁶ At that time, a more sophisticated governance system was needed than the one that existed within the region's tribal communities.⁸⁷ Consequently, the Quran and the Prophet's teachings laid the foundations of Sharia – or, in Arabic, 'the way'.⁸⁸ Simply put, Sharia is a way of living life. Its fundamental objective is to promote good and to protect humans from evil, harm, and suffering.⁸⁹ Legal systems inspired by Sharia are called Islamic law.⁹⁰ The initial versions of Islamic laws were, in fact, progressive and a major improvement from anything else known to societies in the region at that time. Islamic law traditionally draws from four sources: 1) the Quran; 2) the Sunnah or Prophet Muhammad's teachings; 3) ijma or the consensus of Muslim scholars; and 4) qiyas, which is the analogical reasoning as applied to the deduction of juridical principles from the Quran and the Sunnah (the normative practice of the community).⁹¹

In later years, different schools of Islamic law came into existence, each applying its own interpretation of what constitutes Sharia and each developing further to accommodate changing times. Five such schools have survived into modern ages: Hanafi, Maliki, Shafi'i, Hanbali, and Ja'fari.⁹² The first four are followed by Sunni

⁸⁶Z. Keskin and M. Ozalp, 'Explainer: what is shariah law and what version of it is the Taliban likely to implement?', *The Conversation*, 24 August 2021 <www.theconversation.com/explainer-what-is-shariah-law-and-what-version-of-it-is-the-taliban-likely-to-implement-166490>.

⁸⁷ibid.

⁸⁸ibid.

⁸⁹ibid.

⁹⁰A.E. Sparr, 'Legal Pluralism and Sharia: Implementing Islamic Law in States and Societies', *E-International Relations*, 18 December 2014 <<https://www.e-ir.info/2014/12/18/legal-pluralism-and-sharia-implementing-islamic-law-in-states-and-societies/>>.

⁹¹J.L. Esposito and N.J. DeLong-Bas, *Women in Muslim Family Law*, Syracuse University Press, Syracuse 2017, p. 2.

⁹²K. Robinson, 'Understanding Sharia: The Intersection of Islam and the Law', *Council on Foreign Relations*, 17 November 2021 <www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law>.

Muslims and the last by Shiite Muslims.⁹³ Even within the schools, the application of Sharia varies widely. The Western-backed government that ruled Afghanistan from 2001–21 had also claimed to govern within the tenets of Islamic law.⁹⁴ Still, the Taliban had found their version of Islamic law impermissible.⁹⁵ However, among all these varying interpretations, there is one underlying problem. Sharia helped establish a judicial system in the 7th century. Islamic jurisprudence underwent reform in some regions until the medieval ages, but after the medieval ages, it ceased evolving for reasons beyond the scope of this report.⁹⁶ Hence, while Sharia can illuminate a wide range of subjects, including trade and economics, there is no guidance concerning some of the more complex laws needed by modern states, such as company law or administrative law.⁹⁷ Furthermore, Sharia provides no rules on how a state should be governed, whether as a democracy or otherwise.⁹⁸ Nevertheless, scholars argue that Sharia is not incompatible with democracy and actually promotes such a system, as the Quran advocates mutual consultation among people.⁹⁹ This was, in fact, an extremely prominent view during the Arab Spring Revolution.¹⁰⁰ Alternate views are often a result of a misinterpretation of what democracy entails or a means by groups such as the Taliban and countries such

⁹³ibid.

⁹⁴A. Ibrahim, 'Explainer: The Taliban and Islamic law in Afghanistan' *Al Jazeera*, 23 August 2021 <<https://www.aljazeera.com/news/2021/8/23/hold-the-taliban-and-sharia-law-in-afghanistan>>.

⁹⁵ibid.

⁹⁶For a detailed explanation of the causes and reasons on this point, see Z. Keskin and M. Ozalp, 'Explainer: what is shariah law and what version of it is the Taliban likely to implement?', *The Conversation*, 24 August 2021 <www.theconversation.com/explainer-what-is-shariah-law-and-what-version-of-it-is-the-taliban-likely-to-implement-166490>.

⁹⁷A. Jeong, J. Hassan and S.P. Bailey, 'The Taliban says it will rule under sharia law. What does that mean?', *Washington Post*, 25 August 2021 <<https://www.washingtonpost.com/world/2021/08/19/sharia-law-afghanistan-taliban/>>.

⁹⁸K. Robinson, 'Understanding Sharia: The Intersection of Islam and the Law', *Council on Foreign Relations*, 17 November 2021 <www.cfr.org/backgrounder/understanding-sharia-intersection-islam-and-law>.

⁹⁹ibid.

¹⁰⁰ibid.

as Saudi Arabia to use the guise of Sharia to legitimise their own authoritarian regimes.¹⁰¹

Although Sharia does not provide much guidance regarding systems of government, it provides such for religious, social, and criminal issues. How, then, does the Taliban view Sharia's guidance in these areas? Consider one of the most often-discussed issues concerning Sharia in Afghanistan: criminal punishments. Islamic law traditionally recognises three types of crimes: Hadd, Qisas, and Tazir.¹⁰² Hadd (or Hudud) are considered crimes against God and include robbery, adultery or immoral sexual intercourse, blasphemy, and consumption of alcohol.¹⁰³ The harsh punishment for these crimes, as fixed by the Quran or Sunnah, include flogging, stoning to death, and amputation of the hands or feet.¹⁰⁴ Tazir are those offences that are not covered by Hudud and are left to the courts' discretion.¹⁰⁵ While punishment for Tazir offences can also be severe, such as death, Islamic courts are often careful not to impose penalties harsher than those prescribed for Hadd offences. Qisas are crimes against a person, such as homicide and battery.¹⁰⁶ Punishment for these crimes is retributive in nature and set by law.¹⁰⁷ If courts approve, the victim (or their next of kin) can waive retribution by accepting financial compensation or pardoning the accused.¹⁰⁸

Under Islamic law, the evidentiary standards are extremely high, and harsh punishments are rarely given.¹⁰⁹ Moreover, Islamic law generally states that harsh punishments should be avoided if there is

¹⁰¹D. Smock, 'Islam and Democracy', Special Report 93, United States Institute of Peace, Washington DC 2002, p. 3
<<https://www.usip.org/sites/default/files/sr93.pdf>>.

¹⁰²F.J. Ziadeh, 'Criminal Law', *Oxford Islamic Studies Online*, 1 November 2008
<<https://web.archive.org/web/20081101103325/http://www.oxfordislamicstudies.com/article/opr/t236/e0170>>.

¹⁰³S. Tellenbach, 'Islamic Law' in M.D. Dubber and T. Hörnle (eds), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford 2014, pp. 251–52.

¹⁰⁴*ibid.*

¹⁰⁵F.J. Ziadeh, 'Criminal Law', *Oxford Islamic Studies Online*, 1 November 2008
<<https://web.archive.org/web/20081101103325/http://www.oxfordislamicstudies.com/article/opr/t236/e0170>>.

¹⁰⁶*ibid.*

¹⁰⁷*ibid.*

¹⁰⁸*ibid.*

¹⁰⁹W.B. Hallaq, *An Introduction to Islamic Law*, Cambridge University Press, Cambridge 2009, p. 173.

any doubt, and whenever possible, leniency should be accorded to offenders.¹¹⁰ It is believed that harsh punishments are listed in Islamic law to have a preventative effect.¹¹¹ Nonetheless, today, very few Islamic countries follow Islamic criminal codes, having modified them to align with European models instead.¹¹² Only a few ultra-conservative countries in the Middle East follow Islamic criminal law.¹¹³ Even then, they require the higher evidentiary standards that Islamic law calls for or have undergone several reforms over the last couple of centuries.¹¹⁴ Countries, even in the Islamic world, have realised that punishments prescribed originally under Islamic law were instituted for different times and were in line with those practised by other religions and societies of that time.¹¹⁵ Just as other religious practices and societies have had to reform, so have those in the Islamic world.¹¹⁶

The Taliban, though, has not accepted this reality. They use a version of criminal law that many argue either has remained in the 7th century or belies a convoluted interpretation of Islam.¹¹⁷ For much of its history, the Taliban has been known for carrying out harsh punishments, including amputations of children and public executions of women, without following any due process of law or restraint and that are surely not in line with the high evidentiary standards required by Islamic law.¹¹⁸ Within days of their coming into power, this became the norm again and occurred on an

¹¹⁰W.B. Hallaq, *Shariah: Theory, Practice, Transformations*, Cambridge University Press, Cambridge 2009, p. 311.

¹¹¹J.A.C. Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy*, Oneworld Publications, London 2014, pp. 180–81.

¹¹²J.M. Otto, *Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy*, Leiden University Press, Leiden 2008, pp. 18–22.

¹¹³*ibid.*

¹¹⁴*ibid.*

¹¹⁵*ibid.*

¹¹⁶*ibid.*

¹¹⁷R. Synovitz, 'Taliban "Tribal Version": Shari'a Is Not The Same Everywhere', *RFERL*, 2 October 2021 <<https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html>>.

¹¹⁸M. Saifullah, 'A disturbing trend in Afghanistan,' *DW*, 15 March 2017 <<https://www.dw.com/en/the-disturbing-trend-of-taliban-justice-in-afghanistan/a-37950678>>.

unprecedented scale.¹¹⁹ One expert has stated that the Taliban feels pressure to resume such harsh punishments in order to mark the achievement of their mission to establish their interpretation of Sharia in Afghanistan.¹²⁰ Beyond this, the Taliban has another motive for implementing such draconian criminal systems. It believes that they will promote law and order – something many Afghans value above anything else, considering Afghanistan has not been at peace for four decades.¹²¹ Securing law and order has been extremely vital for the Taliban’s popularity in Afghanistan.

Another area of law that has been a major point of discussion with regard to Afghanistan is women’s rights. The Quran, while stating that wives and mothers have certain specific roles in the family and society, provides for women’s equality and allows for their education and financial independence, etc. At the same time, it touches upon several issues related to women that can, if interpreted in a certain way, result in the significant diminishing of women’s rights. For example, a verse in the Quran can be interpreted to mean that women are subservient to men who are their protectors.¹²² Further, if a woman persistently disobeys her male protector, he can strike or beat her as a last resort.¹²³ Nonetheless, scholars have argued that such interpretations of Sharia stem from social practices and have no religious roots.¹²⁴ Intisar Rabb has stated that when it comes to women’s conduct, there is very little that Islamic law actually mandates, and thus, there is substantial room for the reform

¹¹⁹‘Public Displays of Corpses Signal Return of Hard-Line Afghan Taliban’, *VOA News*, 27 September 2021 <<https://www.voanews.com/a/public-displays-of-corpses-signal-return-of-hard-line-afghan-taliban-/6248297.html>>.

¹²⁰R. Synovitz, ‘Taliban “Tribal Version”: Shari’a Is Not The Same Everywhere’, *RFERL*, 2 October 2021 <<https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html>>.

¹²¹H. Rahimi, ‘The Taliban, the Afghan state, and the rule of law’, *Al Jazeera*, 1 September 2021 <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>>.

¹²²L. Beyer, ‘What Sharia Law for Afghan Women Under the Taliban Might Mean’, *Bloomberg*, 17 August 2021 <<https://www.bloomberg.com/news/articles/2021-08-17/sharia-law-for-afghan-women-what-that-might-be-quicktake>>.

¹²³*ibid.*

¹²⁴F. Mernissi, *Veil and the Male Elite – A Feminist Interpretation of Women’s Rights in Islam*, Perseus Publishing, New York 1991.

of women's rights.¹²⁵ Several Islamic laws relating to women have been reformed in recent years by Muslim countries.¹²⁶ A prominent example is Saudi Arabia's ban on women driving. For decades, Saudi Arabia argued that women were prohibited from driving under Islam, but it backtracked under public pressure and granted women the right to drive in 2018.¹²⁷ In discussing this reversal, Rabb says:

It's just yet another example that a lot of the rules that are called Islamic are often local, culturally inflected preferences that come to have an Islamic veneer.¹²⁸

Since coming to power, the Taliban has stated that women's rights will be respected within the bounds of Sharia.¹²⁹ Precisely what this means depends wholly on their preferred interpretations. When they were previously in power, the Taliban barred women from working or leaving the house without a male guardian, eliminated schools for girls, and publicly flogged or executed women who violated the Taliban's morality code.¹³⁰ In a widely reported incident, they cut off a woman's thumb for wearing nail polish.¹³¹ In regions under their control, the Taliban has never ceased enforcing such strict laws against women.¹³² Some spokespeople have made assurances that women under the present Taliban regime will be allowed to work and study, while others have stated that women might participate in the government.¹³³ Although some believe that the Taliban might

¹²⁵K. Robinson, 'Understanding Sharia: The Intersection of Islam and the Law', *Council on Foreign Relations*, 17 November 2021 <www.cfr.org/backgroundunder/understanding-sharia-intersection-islam-and-law>.

¹²⁶*ibid.*

¹²⁷*ibid.*

¹²⁸*ibid.*

¹²⁹A. Jeong, J. Hassan and S.P. Bailey, 'The Taliban says it will rule under sharia law. What does that mean?', *Washington Post*, 25 August 2021 <<https://www.washingtonpost.com/world/2021/08/19/sharia-law-afghanistan-taliban/>>.

¹³⁰D. Victor, 'What is Sharia law, and what does it mean for Afghan women under the Taliban?', *New York Times*, 19 August 2021 <<https://www.nytimes.com/article/shariah-law-afghanistan-women.html?>>.

¹³¹*ibid.*

¹³²*ibid.*

¹³³A. Jeong, J. Hassan and S.P. Bailey, 'The Taliban says it will rule under sharia law. What does that mean?', *Washington Post*, 25 August 2021

now govern differently, the early signs have not been optimistic. Within days of assuming power, the Taliban asked female journalists, judges, bank officials, and other professionals to stop reporting to work.¹³⁴ Outside Kabul, women have been prohibited from leaving their houses without a male relative escort.¹³⁵ The Taliban have also prevented women from entering universities and have shut down some women's clinics and schools.¹³⁶ They also shut down the Women's Affairs Ministry and replaced it with a Ministry of Vice and Virtue.¹³⁷ The Ministry of Vice and Virtue, which existed during the previous Taliban rule, is a department of religious police that oversees the enforcement of the group's morality codes.¹³⁸ In the past, members of the Ministry drove around neighbourhoods in pickup trucks and publicly humiliated and whipped women who did not adhere to their rules.¹³⁹

The Taliban has had a similar regressive interpretation of Islam in other areas of culture as well. Among several other regressive acts, they have banned music and television and imprisoned men whose beards were considered short.¹⁴⁰ Though these examples paint a rather grim picture of the Taliban's interpretation of Sharia, one area in which the Taliban's interpretation has been consistent and has refrained from draconian measures is the realm of civil laws. Here, the Taliban has asked its judges to consult the *Majallat al-Ahkam al-Adliyya*, the Ottoman Empire's codification of Hanafi

<<https://www.washingtonpost.com/world/2021/08/19/sharia-law-afghanistan-taliban/>>.

¹³⁴D. Victor, 'What is Sharia law, and what does it mean for Afghan women under the Taliban?', *New York Times*, 19 August 2021 <<https://www.nytimes.com/article/shariah-law-afghanistan-women.html?>>.

¹³⁵*ibid.*

¹³⁶*ibid.*

¹³⁷R. Synovitz, 'Taliban "Tribal Version": Shari'a Is Not The Same Everywhere', *RFERL*, 2 October 2021 <<https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html>>.

¹³⁸D. Victor, 'What is Sharia law, and what does it mean for Afghan women under the Taliban?', *New York Times*, 19 August 2021 <<https://www.nytimes.com/article/shariah-law-afghanistan-women.html?>>.

¹³⁹*ibid.*

¹⁴⁰L. Maizland, 'The Taliban in Afghanistan', *Council on Foreign Relations*, 15 September 2021 <<https://www.cfr.org/background/taliban-afghanistan#chapter-title-0-5>>.

jurisprudence.¹⁴¹ This document consolidates and clarifies Islamic guidance on contracts, torts, and civil procedure and has been the source of civil law in several Islamic countries.¹⁴² Taliban court officials have referenced the majallat in resolving disputes over business, debt, inheritance, ownership, and similar topics.¹⁴³ However, the Taliban's consistency in this area can be attributed to their intention of establishing Sharia courts as substitutes for the primary judicial system, which served to benefit the Taliban in several ways, as explained in the previous section.

Thus, it can be stated that the Taliban's idea of Sharia and Islamic law is draconian, outdated, and possibly wrong. It diverges from such interpretations only when it serves ulterior purposes.

4. Rule of Law Under the Taliban

The rule of law is a highly contested term.¹⁴⁴ Not only are there many varying definitions of the term, but the term has undergone significant developments in its interpretation.¹⁴⁵ Though this section will shed light on some of these interpretations, the rule of law, in its simplest connotation, implies legal protection against the arbitrariness of those in power.¹⁴⁶ Islamic law developed with this precise goal in mind.¹⁴⁷ It sought to replace primitive, barbaric, and arbitrary systems in the tribal regions where Islam first developed and to provide certain rules that caliphs and rulers could not violate in governing the populace. As was stated earlier, the regulations that comprised Islamic law were far more progressive than those that existed in much of the world at that time. They applied a stringent burden of

¹⁴¹A. Jackson and F. Weigand, 'Rebel Rule of Law: Taliban courts in the west and north-west of Afghanistan', Humanitarian Policy Group, London 2020, p. 5.

¹⁴²*ibid.*

¹⁴³*ibid.*

¹⁴⁴For a succinct account of the various definitions of the term See J. Waldron, 'The Rule of Law' in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, Stanford 2020 <<https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>>.

¹⁴⁵*ibid.*

¹⁴⁶A. Sajó, 'The Rule of Law' in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge University Press, Cambridge 2019, p. 261.

¹⁴⁷N. Feldman, 'Does Shariah mean the rule of law?', *New York Times*, 16 March 2008 <<https://www.nytimes.com/2008/03/16/news/16iht-16shariaht.11119704.html?>>.

proof standard and established rules favouring victims' rights. Further, since the progressive development of Islamic law was in the hands of ulemas and not the rulers, it ensured a degree of separation of powers and prevented rulers from drafting laws that tilted the scales in their favour. Even though Islamic law has not developed to reflect the modern world, it is arguably neither Islamic law nor Sharia that hinders the establishment of the rule of law. The disconnect between Islamic law and some of the modern notions of the rule of law is largely due to perverse interpretations, resistance to reform, and the authoritarian ambitions of groups such as the Taliban.¹⁴⁸ The remainder of this section will highlight how the rule of law is lacking (and will most probably continue to be so) in Afghanistan under the Taliban.

Even in its most formal avatar, certain elements need to exist in a society to ensure the rule of law. First, laws should be clear, prospective, coherent, practicable, stable, and without contradiction.¹⁴⁹ Secondly, official action should be consistent with the laws, and the discretion accorded to law enforcement agencies should not undermine the very purpose of laws.¹⁵⁰ Thirdly, there should be access to an independent judiciary tasked with upholding the laws and evaluating them for validity.¹⁵¹

In Afghanistan, all three elements are lacking. With regard to the laws under which the Taliban operates, the Taliban has stated that it will govern in accordance with Sharia. This is too vague a proclamation to form the basis of the rule of law. The Taliban also seems disinclined to provide any clarifications beyond this. For example, when pressured to explain what it means by 'women will be accorded rights within the bounds of Sharia', the Taliban simply stated that it would clarify this issue at a later date when its officials are

¹⁴⁸N. Rampal, 'Not just under Taliban, data shows Sharia law hardly ever lets freedom flourish', *The Print*, 3 September <<https://theprint.in/world/not-just-under-taliban-data-shows-sharia-law-hardly-ever-lets-freedom-flourish/727065/>>.

¹⁴⁹J. Waldron, 'The Rule of Law' in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, Stanford 2020 <<https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>>.

¹⁵⁰A. Sajó, 'The Rule of Law' in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge University Press, Cambridge 2019, p. 264.

¹⁵¹*ibid*.

trained to deal with women.¹⁵² Perhaps its ambiguity serves its interest by preserving a degree of flexibility to do as it pleases, spin information as it wishes, and avoid internal disagreements. During its previous time in power (and even during their exile), the Taliban barely engaged in any codification and ruled by diktats issued arbitrarily.¹⁵³ This manner of operation allowed it to attribute everything to Islam and avoid any need for legal justification. Early signs show that this is precisely the pattern it intends to follow (and has been following in the early days of assuming power).¹⁵⁴

Even in the enforcement of its version of Sharia, the Taliban engages in patterns of behaviour that fly against the tenets of Islam. It practices vigilante justice and rules by violence and brute force.¹⁵⁵ The morality police arrest, humiliate and torture people in brutal fashion without leniency or adherence to Islam's stringent evidentiary procedures.¹⁵⁶ The Taliban believes that such a law enforcement system will deter crime and preserve the sanctity of society.¹⁵⁷ For it, the baseline is a society with order and low crime rates, yet its viewpoint neglects to remember that people need protection not only from each other but also from the state.¹⁵⁸ Beyond this, there are other reasons for the Taliban's manner of operating. For years, the Taliban has hidden in the mountains and villages, engaging in violence to survive and sustain.¹⁵⁹ Once in power, it simply continues

¹⁵²H. Rahimi, 'The Taliban, the Afghan state, and the rule of law', *Al Jazeera*, 1 September 2021 <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>>.

¹⁵³S. Glinski, '12 Angry Men', *Foreign Policy*, 28 October 2021 <<https://foreignpolicy.com/2021/10/28/afghanistan-taliban-justice-sharia/>>.

¹⁵⁴S. Pasarlay, 'Afghanistan's Unwritten Constitution under the Taliban', *Blog of the International Journal of Constitutional Law*, 17 May 2022 <<http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/#more-11897>>.

¹⁵⁵D. Victor, 'What is Sharia law, and what does it mean for Afghan women under the Taliban?', *New York Times*, 19 August 2021 <<https://www.nytimes.com/article/shariah-law-afghanistan-women.html?>>.

¹⁵⁶*ibid.*

¹⁵⁷H. Rahimi, 'The Taliban, the Afghan state, and the rule of law', *Al Jazeera*, 1 September 2021 <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>>.

¹⁵⁸*ibid.*

¹⁵⁹M. Fisher, 'How Will the Taliban Govern? A History of Rebel Rule Offers Clues', *New York Times*, 2 September 2021

engaging in this manner as it has no experience in peaceful governance.¹⁶⁰ Furthermore, such a law enforcement system allows the Taliban to rule by fear and prevent dissent, which strengthens its hold on power.¹⁶¹

Lastly, examining the issue of courts and access to justice under Taliban rule, again, the Taliban does not believe in exhibiting any degree of neutrality or impartiality. Soon after coming into power, the Taliban stormed the Afghanistan Independent Bar Association and ordered its staff to stop working. It issued a decree which would remove the bar's independence and bring it under the control of the Ministry of Justice. The Taliban also stated that only Taliban-approved lawyers are permitted to practice law, effectively disbarring thousands of lawyers. The Venice Commission considers the independence of the bar as a vital component of access to justice and, consequently, of the rule of law.¹⁶² Furthermore, the Taliban has sought retribution against the judges of the previous regime.¹⁶³ The Taliban's philosophy concerning the role and appointment of judges in a society does not guarantee judicial independence. It has been stated that the Taliban treats judges as an agent of the ruler and, hence, has made no effort to create an independent judiciary.¹⁶⁴ Judges serve at the whim of the Amir, who has the power to appoint and remove them. Like many authoritarian regimes, they have tried to ensure that judges and government officials align with their ideology.¹⁶⁵ Thus, they often handpick their judges from madrasas that teach a specific ideology.¹⁶⁶ If judges do not eventually side with

<<https://www.nytimes.com/2021/09/02/world/asia/taliban-govern-rebel-history.html>>.

¹⁶⁰ibid.

¹⁶¹ibid.

¹⁶² Venice Commission, 'Rule Of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016)', CDL-AD(2016)007, 18 March 2016, p. 41.

¹⁶³S. Cannane, 'When the Taliban came after Afghanistan's judges, a daring escape plan was hatched', *ABC News*, 28 December 2021 <<https://www.abc.net.au/news/2021-12-29/inside-the-daring-plan-to-spirit-brave-judges-out-of-afghanistan/100714310>>.

¹⁶⁴H. Rahimi, 'The Taliban, the Afghan state, and the rule of law', *Al Jazeera*, 1 September 2021 <<https://www.aljazeera.com/opinions/2021/9/1/the-taliban-the-state-and-the-rule-of-law>>.

¹⁶⁵ibid.

¹⁶⁶ibid.

them, the Taliban simply ignores them or, even worse, retaliates against them.¹⁶⁷ This, again, is quite in contrast with the Islamic conception of judges, under which ulemas who act as judges are independent of the ruling class.¹⁶⁸ Therefore, even the most baseline conception of the rule of law is non-existent under Taliban rule, but it is also considered to be against their interests. Furthermore, at present, the Taliban is simply focused on gaining ever-increasing control over the state, not on improving governance.¹⁶⁹ Thus, the rule of law will likely remain elusive in the near future in Afghanistan.

There is another issue to consider. The aforesaid discussed what is known as a formal or thin conception of the rule of law. While often criticised,¹⁷⁰ it has been argued that the rule of law incorporates notions such as procedural fairness, equality before the law, and, at times, even human rights.¹⁷¹ It is evident that Taliban rule, which does not even satisfy the criteria of the thin definition of the rule of law, certainly does not meet the high threshold of a thick definition. Understanding the reasons for this helps gain a more defined sense of the Taliban's ideology and what the future holds for Afghanistan.

As was noted in the previous section, Islamic law demands an extremely high evidentiary standard and incorporates the modern doctrine of presumption of innocence into decision-making. It also requires that men and women be considered equal in the eyes of the law (at least in principle). The Taliban and its courts certainly do not apply such rules. They have often dispensed with the procedural requirements and passed rushed decisions, especially in cases that involve public executions and amputations. Taliban courts have addressed human rights questions in ways that are difficult to reconcile with even some of the most orthodox interpretations of Islamic law.

¹⁶⁷ibid.

¹⁶⁸ibid.

¹⁶⁹S. Glinski, '12 Angry Men', *Foreign Policy*, 28 October 2021 <<https://foreignpolicy.com/2021/10/28/afghanistan-taliban-justice-sharia/>>.

¹⁷⁰For the most prominent critique of such a conception of rule of law See J. Raz, *The Authority of Law*, Oxford University Press, Oxford 1979, p. 211. For other critiques see J. Waldron, 'The Rule of Law' in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, Stanford 2020 <<https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>>.

¹⁷¹M. Tommasoli, 'Rule of Law and Democracy: Addressing the Gap Between Policies and Practices', *United Nations Chronicle*, December 2012 <www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>.

Curiously, it has been argued that most leaders of the Taliban often have little to no training in interpreting Sharia.¹⁷² The question of why the Taliban has developed such an understanding of justice, human rights, and law arises. There are three important factors at play here. The first, as argued by Haroun Rahimi, is the idea that harsh punishments are a means to control the population.¹⁷³ Rahimi states that since the Taliban does not have a strong state apparatus to control the population, violence and public forms of punishment become a control mechanism.¹⁷⁴ The next reason is that the Taliban rejects anything it views as even remotely Western.¹⁷⁵ Since the Taliban considers progressive values to have Western roots, it seeks to implement the most extreme, regressive versions of Islam possible.¹⁷⁶ Lastly, to highlight its victory over the West, the Taliban is more than eager to implement its firebrand version of Islam in a rather public manner.¹⁷⁷

What does the future of the rule of law – both the thin and thick conceptions – hold for Afghanistan? While one would hope to be optimistic in either case, the future looks grim. Though scholars argue that Islamic law itself has the potential for significant reform, the scope in Afghanistan for reform seems narrow. As this section highlights, the Taliban views either conception as unnecessary and often even detrimental to their existence. Generally, the international community attempts to pressure regimes such as the Taliban to adopt moderate stances by halting aid and imposing sanctions. However, it is questionable whether such techniques will be effective in the present situation. The Taliban has shown no hesitation in allowing

¹⁷²R. Synovitz, 'Taliban "Tribal Version": Shari'a Is Not The Same Everywhere', *RFERL*, 2 October 2021 <<https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html>>.

¹⁷³R. Synovitz, 'Judge, Jury, And Executioner: Taliban Brings Afghanistan's Justice System Under Its Thumb', *RFERL*, 1 December 2021 <<https://gandhara.rferl.org/a/taliban-afghanistan-justice-system/31588972.html>>.
¹⁷⁴*ibid.*

¹⁷⁵K. Robinson, 'Understanding Sharia: The Intersection of Islam and the Law', *Council on Foreign Relations*, 17 November 2021 <www.cfr.org/background/understanding-sharia-intersection-islam-and-law>.

¹⁷⁶*ibid.*

¹⁷⁷R. Synovitz, 'Taliban "Tribal Version": Shari'a Is Not The Same Everywhere', *RFERL*, 2 October 2021 <<https://gandhara.rferl.org/a/taliban-sharia-law-afghanistan/31488108.html>>.

thousands of people to die of starvation.¹⁷⁸ On the contrary, it is possible that the Taliban will respond to the threats of the international community by simply doubling down on their actions. Rogue regimes like the Taliban are notoriously famous for doing so. One may also need to consider how the Taliban managed to survive for all these years and to return to power. It is known that the Taliban was funded by foreign governments and also earned revenue from the opium trade.¹⁷⁹ It was able to gain support, especially in rural areas, due to the failure of the Western-backed government to improve life for Afghans. In a changing world order, the Taliban might manage to scrape by without joining hands with Western forces as long as it has minimum domestic support and certain countries are ready to support those in power. Recent years have witnessed several countries treading this path. It would be incredibly difficult to predict what the future holds for the rule of law in Afghanistan. Early signs are certainly not hopeful.

5. Conclusion

Since assuming power, the Taliban has wasted no time in dismantling the previous system, which sought to establish a democratic state in the Islamic world. In its place, the Taliban has installed a rudimentary authoritarian regime that operates without any rule of law and instils in people the fear of bullets. Under the guise of Sharia, rights for women and minorities and the space for dissent have been reduced to nil.

Studying the rule of law in Afghanistan highlights several important points. Most significantly, it illuminates the relationship between Sharia and the rule of law. Data underscores that in most countries (not only Afghanistan) that claim to base their systems on Sharia, the rule of law is weak. However, as explained, the problem is not Islam but rather those invoking Islam. Islam has substantial room for reform and is capable of accommodating to changing times. Groups such as the Taliban cling to antiquated or incorrect interpretations of Sharia to forward their agendas or remain in power.

¹⁷⁸‘The world must act now to stop Afghans starving’, *The Economist*, 13 November 2021 <<https://www.economist.com/leaders/2021/11/13/the-world-must-act-now-to-stop-afghans-starving>>.

¹⁷⁹L. Maizland, ‘The Taliban in Afghanistan’, *Council on Foreign Relations*, 15 September 2021 <<https://www.cfr.org/taliban>>.

Afghanistan also provides a valuable lesson in attempts to establish a Western conception of the rule of law in societies where the necessary apparatus is absent. The rule of law cannot be thrust onto societies in a technocratic manner from a top-down level. To establish the rule of law, the support and cooperation of domestic partners at every level are needed.¹⁸⁰ In Afghanistan, this was never the case. The West tried to establish the rule of law with only the help of their on-ground allies, who themselves had dubious credentials to which the West were willing to turn a blind eye.¹⁸¹ This was an enormous reason for the re-emergence of the Taliban. This leads to another important point, which is that half-hearted efforts to establish the rule of law in societies like Afghanistan can do more harm than good. Moreover, any benefits that might have resulted from such efforts are frequently undone rather quickly. In a given time and space, impoverished local populations will be concerned with their short-term interests more than with the larger picture. The lack of the rule of law in the Western-backed regime provided the opening for the Taliban to spread its wings again.

Lastly, the example of Afghanistan also demonstrates the downsides of the standard means of force, sanctions, and threats of stopping aid in attempts to force rogue regimes to change their ways. Though it may be argued that these tactics were effective at one time, the world order is changing, and those who care about the rule of law and human rights must begin thinking with a new perspective. If the Taliban has made one thing explicit, it is that it does not want to be told what to do by the West.¹⁸² Any attempts to do so will only provoke further retaliation. There is much for scholars and policymakers to study regarding how to handle actors like the Taliban. The only

¹⁸⁰G. Swenson, 'Why U.S. efforts to promote the rule of law in Afghanistan failed' (2017) 42(1) *International Security* 114, 114–51.

¹⁸¹S. Karimi, 'Afghanistan shows the U.S. folly of trying to implant democratic institutions abroad', *The Conversation*, 29 September 2021 <<https://theconversation.com/afghanistan-shows-the-u-s-folly-of-trying-to-implant-democratic-institutions-abroad-167613>>.

¹⁸²M.E. Cagnassola, 'Taliban Official Warns Other Nations That "No One Will Tell Us What Our Laws Should Be"', *Newsweek*, 23 September 2021 <<https://www.newsweek.com/taliban-official-warns-other-nations-that-no-one-will-tell-us-what-our-laws-should-1632077>>.

achievement of tactics such as force, sanctions, and threats of stopping aid in Afghanistan is the suffering of the local populace because of Western egos.¹⁸³

It is certainly difficult to make any accurate predictions of the future of the rule of law in Afghanistan under Taliban rule. The organisation of the Taliban and its manner of operation certainly do not provide any optimism that the rule of law has a bright future in this country. While there are examples of countries managing to escape vicious cycles of brutal authoritarianism, those processes have been extremely slow and have required substantial effort and courage from local populations.¹⁸⁴ It can only be hoped that the people of Afghanistan – most of whom have known no peace in their lifetimes – can live to see a day when their country manages to escape the shackles of violence into an environment that allows the rule of law to flourish.

¹⁸³‘The world must act now to stop Afghans starving’, *The Economist*, 13 November 2021 <<https://www.economist.com/leaders/2021/11/13/the-world-must-act-now-to-stop-afghans-starving>>.

¹⁸⁴J. Yarwood, ‘The Struggle Over Terms Limits in Africa: The Power of Protest’, (2016) 27(3) *Journal of Democracy* 51, 51–60.